EARTHJUSTICE

July 6, 2020

Submitted via www.regulations.gov
Docket ID No. EPA-HQ-OW-OW-2020-0008

Kathy Hurld
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460
404gESAconsultation@epa.gov

RE: Comments on How EPA's Approval of a Clean Water Act Section 404 Program Is Discretionary and Requires Endangered Species Act Section 7 Consultation; 85 Fed. Reg. 30953 (May 21, 2020)

Dear Ms. Hurld:

Please accept these comments submitted by Earthjustice on behalf of Florida Wildlife Federation, Conservancy of Southwest Florida, Miami Waterkeeper, St. Johns Riverkeeper, Columbia Riverkeeper, Waterkeeper Alliance, Center for Biological Diversity, and Natural Resources Defense Council. We submit these comments to highlight how EPA's approval of a state's assumption of Section 404(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, is a discretionary action that requires an Endangered Species Act ("ESA") consultation pursuant to Section 7(a)(2), 16 U.S.C. § 1536(a)(2). Our organizations are devoted to protecting Florida's lands, water and wildlife, and the communities that rely on them.[1] These comments are in addition to any comments submitted by the individual organizations or their members.

I. BACKGROUND

A. Clean Water Act Section 404

Congress enacted the CWA in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To help accomplish this goal, the CWA prohibits the discharge of any pollutant, including dredged spoil or other fill material,

[1] A summary of each organization's interests in these issues is provided at the end of this letter.

FLORIDA OFFICES
111 SOUTH MARTIN LUTHER KING JR. BLVD.
TALLAHASSEE, FL 32301
T: 850.681.0031

4500 BISCAYNE BLVD., SUITE 201
MIAMI, FL 33137
T: 305.440.5232

FLOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

into waters of the United States unless authorized by a permit. 33. U.S.C. § 1311(a). Unless statutorily exempt, all discharges of dredged or fill material into waters of the United States must be authorized under a CWA § 404 permit issued by the U.S. Army Corps of Engineers. 33 U.S.C. § 1344(a)–(e).

CWA § 404 also contains provisions allowing for a state to assume the program. 33 U.S.C. § 1344(g)–(h). Under § 404(g), a state may submit an application to assume § 404 permitting to EPA and to the U.S. Fish and Wildlife Service ("FWS"). 33 U.S.C. § 1344(g). FWS then must submit any comments on the proposed assumption to EPA. 33 U.S.C. § 1344(g)(3). Under § 404(h)(1), EPA shall "tak[e] into account any comments" it receives from FWS, 33 U.S.C. 1344(h)(1), and determine, using the comments and a list of criteria, whether the State has the required ability to assume § 404 permitting power. *Id.*

In order to obtain § 404 permit authority from the Corps under the CWA and 40 C.F.R. § 233.10, a state must submit three copies of the following to the EPA regional administrator:

1) A letter from the Governor requesting program approval;
2) A complete program description as set forth in 40 C.F.R. § 233.11;
3) An Attorney General's statement as set forth in 40 C.F.R. § 233.12;
4) A Memorandum of Agreement with EPA as set forth in 40 C.F.R. § 233.13;
5) A Memorandum of Agreement with the Corps as set forth in 40 C.F.R. § 233.14; and
6) Copies of all applicable state statutes and regulations, including those governing applicable state administrative procedures.

40 C.F.R. § 233.10. CWA § 404(g) establishes a 120-day review period that commences on the date of receipt of a complete state submission. 33 U.S.C. § 1344(h)(1); 40 C.F.R. § 233.15(a). EPA must determine whether a submission is complete within 30 days of receipt and must notify the state of its determination. 40 C.F.R. § 233.15(a). If EPA finds it is incomplete, the statutory review period does not begin until EPA receives all the necessary information. *Id.* Within 10 days of receiving a completed application, the EPA Regional Administrator will distribute the assumption application to the U.S. Army Corps of Engineers ("Corps"), FWS, and the National Marine Fisheries Service ("NMFS") for review and comment. *Id.* § 233.15(d). EPA will also make the application available for public review and comment and hold public hearings in the state applying for assumption. *See id.* § 233.15(e).

Within 90 days of EPA's receipt of a complete program submission, the Corps, FWS, and NMFS shall submit to EPA any comments on the state's program. *Id.* § 233.15(f). After taking into consideration all comments received, EPA will make a decision to approve or disapprove assumption of the federal permit program based on whether the state meets the applicable statutory and regulatory requirements for an approvable program. *Id.* § 233.15(g).

A state's assumption of the § 404 program, however, is limited to certain waters. 40 C.F.R. § 233.1(c). The federal program continues to apply to waters that are or could be used for

interstate commerce and wetlands adjacent to these waters, and the Corps retains permitting jurisdiction over these waters. 33 U.S.C. § 1344(g)(1). Federal regulations state that any approved state program shall, at all times, be conducted in accordance with the requirements of the Act and while states may impose more stringent requirements, they may not impose any less stringent requirements for any purpose. 40 C.F.R. § 233.1(d).

A state's assumption of the CWA's § 404 dredge and fill permitting program is a complex, time-consuming, and expensive process. Many states, including Florida, have previously studied the feasibility of assuming the program and have identified a number of significant issues weighing against assumption. The more frequently cited reasons include uncertainty on which waters constitute "waters of the United States," the need for state level statutory and regulatory changes to conform to § 404's permitting requirements, the additional staff, infrastructure, and financial resources needed to effectively administer the program, and the challenges posed by compliance with other federal environmental statutes, most notably the ESA.

B. Endangered Species Act Section 7 Consultation

Congress enacted the ESA "to provide a program for the conservation of ... endangered species and threatened species" and "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). Once a species is listed, various safeguards apply to prevent activities that will cause harm to members of the species or that will jeopardize the survival and recovery of the species in its native ecosystem. *See id.* §§ 1536, 1538. The ESA's ultimate goal is recovery of listed species to the point where they no longer need ESA protection, *id.* §§ 1531(b)-(c); 1532(3).

An "examination of the language, history, and structure [of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). Section 7 of the ESA prohibits agency actions that may jeopardize the survival and recovery of a listed species or adversely modify its critical habitat. 16 U.S.C. § 1536(a)(2). "Action" is defined broadly to encompass "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies," 50 C.F.R. § 402.02, and it extends to ongoing actions over which the agency retains authority or discretionary control. *Klamath Water Users Protective Ass'n v. Patterson,* 204 F.3d 1206, 1213 (9th Cir. 1999). Section 7 establishes an interagency consultation process to assist federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or adverse modification of critical habitat. For actions that may adversely affect a listed species or critical habitat, a formal consultation is required with the expert fish and wildlife agency that culminates in a biological opinion assessing the effects of the action, determining whether the action is likely to jeopardize the continued existence of the species, and, if so, offering a reasonable and prudent alternative that will avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(g)-(h).

Federal agencies additionally must ensure that such actions will not "result in the destruction or adverse modification" of designated critical habitat." 16 U.S.C. § 1536(a)(2). Since critical habitat must be designated outside of a species' current inhabited range under certain circumstances, the "adverse modification" analysis provides habitat protection even in situations where the "jeopardy" analysis does not apply. *See Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir. 2001).

Section 7 consultation is an integral part of the protections afforded by the ESA. Consultation is not just a study in a vacuum, but rather the mechanism for ensuring agencies understand the impact of their actions and discharge their duty to avoid contributing to extinction. Section 7 consultation includes three essential components: (1) the wildlife agencies ensure the best available science is used; (2) the independent scientific review serves as a check on agencies that might seek to advance their primary mission rather than protect endangered species; and (3) the wildlife agencies develop alternatives and mitigation to protect species and their habitat. The ESA makes the best science, at any point in time, the determinant of whether an action is likely to cause jeopardy, degrade critical habitat, or take individual species' members, and the ESA requires that uncertainty be resolved in favor of protection.

II. DELEGATION OF CWA § 404 DUTIES TO A STATE IS A DISCRETIONARY ACTION THAT REQUIRES ESA CONSULTATION.

As EPA recognized in the Federal Register notice seeking public comment, EPA's position has been that consultation under ESA § 7 is not required when EPA approves a state or tribal request to assume CWA § 404 duties because EPA considered this to be a non-discretionary action. 85 Fed. Reg. 30,953 (May 21, 2020). Reconsideration of this position is appropriate: EPA's delegation of CWA § 404 programs to states or tribes is, in fact, a discretionary action, one that requires consultation with FWS and NMFS.

A. The U.S. Supreme Court Decision in *National Association of Home Builders* Held that Assumption of CWA § 402 Programs by States Were Non-Discretionary Decisions that Did Not Require ESA § 7(a)(2) Consultation.

ESA § 7(a)(2) requires any federal agency to consult with federal biological agencies to ensure that any proposed action is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. §1536(a)(2). An agency "action" includes all activities or programs of any kind authorized in part by federal agencies, including the granting of permits. 50 C.F.R. § 402.02. The ESA's implementing regulations provide that § 7(a)(2) applies to "all actions in which there is discretionary Federal involvement or control." 50 C.F.R. § 402.03; *see also Florida Key Deer v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (FEMA had discretion in administering statute that required the agency to make flood insurance available in areas the agency determined had adequate land use and control measures pursuant to criteria the agency developed after considering information it deemed necessary to encourage adoption of local

measures to reduce development in flood-prone land and "otherwise improve long-range land management and use of flood-prone areas" and therefore ESA applied); *cf. Nat. Res. Def. Council v. Houston*, 146 F.3d 1118, 1125-26 (9th Cir. 1998) ("Where there is no agency discretion to act, the ESA does not apply.").

The U.S. Supreme Court most recently addressed the question of discretionary involvement or control in the context of the CWA in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). Reviewing delegation to the state of Arizona of the CWA § 402 program, a section of the Act that controls the issuance of point source pollution permits, the Supreme Court held EPA's delegation of that permitting program was non-discretionary and did not trigger ESA § 7(a)(2) consultation. The Supreme Court looked to the statutory language of § 402(b) that states that the EPA "shall approve each submitted program unless [it] determines that adequate authority does not exist" pursuant to nine listed criteria. 33 U.S.C. § 1342(b) (emphasis added). In reaching its decision, the Supreme Court evaluated the plain language of the statute, the overall statutory scheme, and the EPA's implementing regulations for ESA § 7(a)(2). *Nat'l Home Builders Ass'n*, 551 U.S. at 661–66.

The Supreme Court first determined that the meaning of "shall approve" was must approve "unless" the nine criteria listed were not met. *Id.* at 662. This statutory command left no room for agency discretion to consider the impact of delegation on protected species or their habitat. *Id.* Second, reviewing the overall structure of § 402(b), the Supreme Court held that, because § 402(b) states that the Administrator "shall approve" a state's NPDES assumption application once it met nine enumerated criteria, it operates as both a "ceiling as well as a floor." *Id.* at 663. Additionally, "nothing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." *Id.* at 671. Requiring consultation under ESA § 7(a)(2) would add an additional criterion and "raise[] that floor," creating an impermissible clash with the mandate in § 402(b). *Id.* at 664. Finally, the Supreme Court deferred to the EPA's interpretation that ESA § 7(a)(2) applied only to those situations in which there was room for agency discretion in making a decision. *Id.* at 665. Because CWA § 402(b) set out a clear mandate for the agency to only consider the enumerated criteria, there was no agency discretion. *Id.* at 673.

Following *Home Builders*, courts determine whether an agency action is discretionary by examining whether, given the plain language, purpose, and legislative history of a statute, the "agency had some discretion to influence or change the activity for the benefit of a protected species" when making its decision. *Karuk Tribe of California v. U.S. Forest Serv.*, 681 F.3d 1006, 1021 (9th Cir. 2012). Courts will also look to the implementing regulations that the agency has promulgated under the statute and how the agency has interpreted the statutory language over time to determine whether an agency action is discretionary. *Id.* at 1025-26 (evaluating regulations that the Forest Service issued under mining law to determine whether the agency had discretion to evaluate endangered species before allowing mining activities to proceed).

B. Under *Home Builders*, Delegation of the CWA § 404 Program Is a Discretionary Action.

Since 2010, EPA's position has been that the reasoning in *Home Builders* about CWA § 402 delegation being non-discretionary applied equally to CWA § 404 delegation, resting its position primarily on the similar "shall approve" language in both sections. 85 Fed. Reg. at 30,954. Through this request for comment, EPA acknowledges that it is reconsidering its position. Given the plain language of the statute, EPA's regulations, and the legislative history of the CWA, EPA should reverse its position and find that CWA § 404 delegation is a discretionary action that requires ESA § 7(a)(2) consultation.

1. *The plain language of CWA § 404 requiring EPA to consider comments from FWS makes EPA's delegation decision discretionary.*

ESA consultation is required for an agency action if the statute leaves "some discretion" for the agency to act for the benefit of a protected species. *Nat'l Res. Def. Council v. Jewell*, 749 F.3d 776, 784 (9th Cir. 2014) (citing *Karuk Tribe*, 681 F.3d at 1024). The test is whether, given the plain text and structure of a statute, the "agency could influence [an activity] to benefit a listed species, not whether it must do so." *Karuk Tribe*, 681 F.3d at 1025 (citing *Turtle Island Restoration Network v. Nat'l Marine Fisheries Serv.*, 240 F.3d 969, 977 (9th Cir. 2003)). Here, § 404(g) – (h) do not embody a simple checklist. Instead, these statutory sections include an additional step which requires EPA to "tak[e] into account any comments" from FWS -- leaving room for a consideration of threatened and endangered species. CWA § 402(b), the section at issue in *Home Builders*, does not mention threatened or endangered species nor require EPA to consider any agency comments.

Courts have referred to statutes that leave agencies with no discretion as "checklist" statutes. *See, e.g., Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1220-26 (9th Cir. 2015) (holding that CWA § 311 reads like a "checklist statute" not leaving any room for agency discretion, despite the presence of some ambiguous language).

Unlike the CWA § 402(b) state assumption provision, § 404(g) and (h) explicitly state that FWS must submit comments and EPA must consider them. 33 U.S.C. § 1344(g)(3) (" . . . the Secretary [of the Army] and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall submit any comments with respect to [a proposed State assumption] program and statement to the Administrator in writing."); 33 U.S.C. § 1344(h)(1) (" . . . the Administrator shall determine, taking into account any comments submitted by the Secretary [of the Army] and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service . . . "). This additional step takes the CWA § 404 statutory language out of the checklist, non-discretionary category. In CWA § 402, "[n]othing in the text . . . authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." *Nat'l Home Builders Ass'n*, 551 U.S. at 671. By contrast, CWA § 404(h) provides that additional step,

requiring EPA to take into consideration the federal biological agency's comments regarding the effects of state assumption on protected species and habitat. EPA's consideration of listed species is "an end in itself" that can alter the EPA's final decision, making a § 404(h) action discretionary.

2. *EPA's regulations support an interpretation that CWA § 404 delegation is discretionary.*

EPA's regulations also direct the agency to take into consideration comments from FWS, NMFS, and the Corps. 40 C.F.R. § 233.15(g) ("the Regional Administrator shall approve or disapprove the program based on whether the State's program fulfills the requirements of this part and the Act, taking into consideration all comments received . . . . The Regional Administrator shall respond individually to comments received from the Corps, FWS, and NMFS."). EPA cannot merely go down a check list; it must consider and use these agency comments, which is clearly a discretionary action.

Additionally, CWA § 404(h) references EPA guidelines which explicitly require consideration of endangered and threatened species. 33 U.S.C. § 1344(h)(1)(A)(i). Under § 404(h)(1)(A)(i), a state plan to assume dredge and fill permitting must comply with the guidelines issued under § 404(b)(1). *Id.* Those implementing guidelines, in 40 C.F.R. § 230.30, require consideration of the potential effects on biological characteristics of an aquatic system before issuing permits. These guidelines define threatened and endangered species, § 230.30(a), and list the possible adverse effects from dredge and fill materials, §230.30(b). *Id.*

This guideline reference stands in contrast to CWA § 402(b), which does not contain a reference to any other EPA regulations or guidelines that require evaluating the impact to endangered and threatened species before a final agency action. It is significant that, when drafting § 404(h), Congress chose to mandate that one criterion for a state to assume § 404 permitting power is compliance with "guidelines under subsection (b)(1) of this section." 33 U.S.C. § 1344(h)(1)(A)(i). This incorporation of references to listed species parallels the references to endangered sea turtles encompassed in the High Seas Fishing Compliance Act at issue in *Turtle Island Restoration Network*, where the appellate court held that congressional inclusion of references to international conservation and management measures indicated that the action at issue was discretionary and required ESA § 7(a)(2) consultation. *Turtle Island*, 340 F.3d 969 (holding that the permitting provision of the High Seas Fishing Compliance Act is discretionary, in part, because the statute itself refers to a convention on protecting and conserving certain marine species); *Northwest Envt'l. Adv. v. U.S. Dep't of Commerce*, 283 F. Supp. 3d 982 (W.D. Wash. 2017) (holding that CWA § 319 decisions are discretionary, in part, because EPA promulgated related regulations to flesh out the statutory language).

3. *Contrary to EPA's current interpretation, the legislative history of CWA § 404 shows specific congressional intent to protect fish and wildlife.*

EPA's 2010 Opinion Letter stated that "the legislative history clarifies Congress's intent to make program transfer under § 402 and § 404 essentially the same." U.S. Env'l Protection Agency, Opinion Letter on Applicability of ESA Consultation to CWA § 404(h) Determinations at 2 (Dec. 27, 2010) [hereinafter Opinion Letter]. However, this position overlooks the clear distinction between the Congressional intent in designing § 404 and § 402 — the legislative history of § 404 reflects a desire to ensure that fish and wildlife that depend on wetlands are protected, while the legislative history of § 402 reflects a desire to create a program to allow the states to assume permitting power as quickly as possible without considering criteria outside of what is listed in the statute.

The legislative history of § 404(h) reflects a desire to ensure wetlands are protected and to prevent "serious, permanent ecological damage." S. REP. NO. 95-370, 10 (1977) [hereinafter S. Rep.]. The "implementation of section 404 . . . attempted to achieve" a correction of the unregulated destruction of wetlands. *Id.* Throughout the Congressional Record, Congress members made statements emphasizing that protection of wildlife is a nation-wide concern that EPA should use its authority to address.

Senator Chaffee offered that "I think it is important to bear in mind that marshes and wetlands are . . . a national asset. They are not just confined within boundaries which happen to exist in any one of our States. The wetlands perform a vital part of the food chain for our wildlife." 123 Cong. Rec. (Bound) 26682, 26716 (Aug. 4 1977) [hereinafter 1977 Cong. Rec.]. Senator Baker added that "the [CWA] places the responsibility upon EPA to administer a permit program for industrial and municipal discharges. . . . The statutory language authorizing the 404 program requires cooperation of [the Army] [C]orps [of Engineers] and EPA to insure that discharges of dredged material and fill material will not have unacceptable adverse effects on municipal water supplies, shellfish beds, fisheries, wildlife, and recreation." 1977 Cong. Rec. at 26718. The Senate Report states that "although discretion is granted to establish separate administration for a State permit program, the authority of the Administrator to assure compliance with guidelines in the issuance and enforcement of permits and in the specification of disposal sites . . . is in no way diminished." S. Rep., at 78. This reflects a desire to not only protect fish and wildlife, but to give EPA enough "discretion" and "authority" to ensure that § 404 permitting is predominantly a power exercised by the federal agency. *Id.*

The provisions requiring EPA to consider FWS comments further support the view that Congress intended EPA's § 404 delegation to be discretionary, not simply a box checking exercise. The U.S. House of Representatives Report declares that "this procedure is intended to recognize that the [FWS], because of its responsibilities to protect a very vital natural resource, should provide advice and consultation . . . . [FWS] should be involved at the beginning of the permit process and not after the fact." H. R. REP. NO. 95-830, at 105 (1977) (Conf. Rep.). The Senate Report further explains that "committee amendments relating to the [FWS commenting

step in 404(g)–(h)] are designed to (1) recognize the particular expertise of that agency and the relationship between its goals for fish and wildlife protection and the goals of the [CWA]. . . . this consultation preserves the Administrator's discretion in addressing the concerns of these agencies, yet affords them reasonable and early participation . . ." S. Rep., at 78-79 (emphasis added).

In contrast, the legislative history of CWA § 402 does not contain any discussion of protecting wildlife or maintaining discretion and authority in the EPA's permitting power. Rather, it reflects the Congress's desire for "prompt action by the [EPA]" to approve state programs. 118 Cong. Rec. 10198, 10219 (Mar. 27, 1972) (statement of Rep. Terry). In fact, Representatives Absug and Rangel opposed § 402(b) in part because Fish and Wildlife Agencies "will no longer have statutory authority to review and comment on permit applications." 118 Cong. Rec. 8655, 8810 (Mar. 16, 1972). Congressional members highlighted the non-discretionary nature of § 402(b), complaining that "once EPA receives the permit applications, it can do no more than merely file them. No provision is made for EPA to comment on the applications. EPA cannot object to the issuance of a permit." 118 Cong. Rec. at 10240.

It is also important to consider the timing of Congressional action with respect to § 402 and § 404. Congress was fully aware of the ESA's requirements and mandates when drafting and passing § 404(g) and (h), unlike when passing § 402. Pub. L. 95–217, § 67(b), Dec. 27, 1977, 91 Stat. 1600. Indeed, a controlling factor in *Home Builders* was that Congress enacted § 402(b) prior to the ESA and incorporating the ESA's consultation requirement into the state's § 402 assumption checklist would add an additional and unrelated criterion. *Nat'l Home Builders Ass'n*, 551 U.S. at 662-63. The Court explained that although a later enacted statute can amend or repeal an earlier statute, "repeals by implication are not favored." *Id.* The Court therefore found incorporating ESA § 7 consultation would effectively repeal CWA § 402's exclusive checklist for state assumption. *Id.* Given that Congress enacted § 404's operative language after the ESA, along with the congressional intent to specifically consider the Services' comments and protect fish and wildlife, with respect to § 404 assumption, there is nothing to repeal.

III. ESA § 7 CONSULTATION IS A COMPLEX, FACT INTENSIVE ANALYSIS

ESA § 7 consultation on whether EPA's approval of a state's assumption of the CWA § 404 dredge and fill permitting program will jeopardize listed species is a complex, fact intensive analysis. ESA § 7(a)(2) first places a procedural obligation on EPA to initiate consultation with FWS and NMFS "at the earliest possible time" to determine what effects a state's assumption of the § 404 program may have on endangered and threatened species and their critical habitats. ESA § 7(a)(2) next places a substantive obligation on EPA to ensure its actions will not jeopardize the continued existence of endangered and threatened species or destroy or adversely modify their critical habitats. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

A. ESA Requirements for Programmatic Consultation

The ESA's implementing regulations dictate the precise requirements for satisfying this substantive obligation. Pursuant to these regulations, the Services must determine whether a state's assumption of the § 404 program poses an unacceptable risk to the survival, recovery, or critical habitat of any listed species based on the "best scientific and commercial data available" while "considering the effects of the action as a whole." *Id.* § 402.14(c), (d) (emphasis added). The "best scientific and commercial data" standard exists "to ensure that the ESA [is not] implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

Using the "best scientific and commercial data available," the Services must produce a biological opinion. In preparing a biological opinion for a state's assumption of a CWA § 404 program, the Services must review all relevant information provided by EPA "or otherwise available" to evaluate the "effects of the action," including its direct and indirect effects, the "environmental baseline," and "cumulative effects." 50 C.F.R. § 402.14(g)(1)-(4); §402.14(h) (specifying contents of a biological opinion); *see also* 16 U.S.C. § 1536(c). Notably, the regulations reiterate that even when undertaking a programmatic consultation, the action agency is not relieved "of the requirements for considering the effects of the action or actions as a whole." 50 C.F.R. § 402.14(c)(4). Moreover, the "action area" to be examined encompasses "all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action." 50 C.F.R. § 402.02 (emphasis added).

After "add[ing] the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat," the Services must determine whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. 50 C.F.R. § 402.14(g)(4). The Services joint regulations define "jeopardize the continued existence" to mean "[engaging] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." "Destruction or adverse modification" means "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." 50 C.F.R. § 402.02. The Services must also consider both recovery and survival impacts to listed species and critical habitat. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008); *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070-71 (9th Cir.), *amended*, 387 F.3d 968 (9th Cir. 2004). The biological opinion does not merely provide an opinion of whether jeopardy will result, but explains "how the agency action affects the species or its critical habitat." 16 U.S.C. § 1536(b)(3)(a); 50 C.F.R. § 402.14.

When the Services determine that a federal action is likely to jeopardize a species or adversely modify critical habitat, they must also suggest reasonable and prudent alternatives ("RPAs") to the proposed action to avoid such impacts. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §

402.14(h)(3). If the Services conclude that a proposed action will result in the incidental taking of a listed species but will not cause jeopardy or destruction/adverse modification of critical habitat, they must issue an incidental take statement specifying the allowable impact on listed species; reasonable and prudent measures to minimize the impact; measures to comply with the Marine Mammal Protection Act; and other terms and conditions to be followed by the action agency. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i); *Bennett*, 520 U.S. at 170. Note that even mixed programmatic actions require incidental take statements at the programmatic level if the actions are "reasonably certain to cause take and are not subject to further section 7 consultation." 50 C.F.R. § 402.14(i)(6).

To fulfill the ESA § 7 consultation requirement, the Services must also use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2), (b)(4). The agency can not merely list a state's threatened and endangered species, dismiss further analysis as requiring too much speculation, or punt all meaningful analysis to the state at some future time.

B. Consultation on State Assumption of a CWA § 404 Program

By its very nature, assumption of the CWA § 404 program is a major undertaking. It requires exhaustive review by EPA and the Services and, once implemented, immense resources and training at the state level. CWA § 404 permits are required for all projects that necessitate discharging dredge or fill material into Waters of the United States. This implicates a massive amount of widely diverse projects, especially in states with numerous listed species and vast surface waters.

Florida, a state currently pursing assumption of the CWA § 404 program, perhaps illustrates this best. With over 130 listed species, more than 7,700 lakes (greater than 10 acres), 33 first-magnitude springs, 11 million acres of wetlands, almost 1,200 miles of coastline, and approximately 27,561 linear miles of rivers and streams, water and biodiversity are two of Florida's most prominent features.[2] Section 7 consultation in Florida will involve analyzing limitless projects blanketing most of the state to determine their potential impacts on numerous listed species.

---

[2] *See* Florida Fish and Wildlife Conservation Commission, *Florida's Official Endangered And Threatened Species List*, 4 (2018), https://myfwc.com/media/1945/threatend-endangered-species.pdf; Elizabeth Purdum, *Florida Waters: A Water Resources Manual* 49 (2002), https://www.swfwmd.state.fl.us/sites/default/files/store_products/floridawaters.pdf; Florida Department of State, *Quick Facts*, http://dos.myflorida.com/florida-facts/quick-facts/; U.S. Geologic Survey, *National Water Summary on Wetland Resources Water Supply Paper* 2425, https://water.usgs.gov/nwsum/ WSP2425/state_highlights_summary.html; Florida Department of Environmental Protection, *2016 Integrated Water Quality Assessment for Florida* 34 (2016) https://floridadep.gov/sites/default/files/2016-Integrated-Report.pdf.

Florida, however, has proposed that the Services engage in a one-time consultation that would only identify procedural requirements for state permitting under Section 404 needed to support the Services determination that assumption would not result in jeopardy to any listed species. DEP White Paper, *EPA Approval of State Assumption of Clean Water Act Section 404 Program* at 1-2. While programmatic consultation allows consultation on an agency's multiple actions on a program, including a proposed program or regulation that provides a framework for future proposed actions, 50 C.F.R. § 402.02, under Florida's proposal, the truncated consultation would essentially give EPA wholesale approval from the Services for specified and foreseeable actions without any analysis of the effects of the whole action, jeopardy determinations, or take limits in direct contravention to the ESA's mandate, implementing regulations, and numerous court holdings. *See, e.g., Conner v. Burford*, 848 F.2d 1441, 1453-54 (9th Cir. 1988); *N. Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 521 (9th Cir. 2010); *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 726 F. Supp. 2d 1195, 1225-26 (D. Mont. 2010). Under such an approach, the Services will have failed to fully consult on the action and EPA will not satisfy its burden to ensure that the proposed action is not likely to jeopardize listed species or destroy or adversely modify critical habitat.

The sheer number of listed species in Florida alone results in various circumstances for permit review that a truncated consultation's blanket authority cannot adequately cover. With Florida's vast waterways creating further complexities, Florida must explain to EPA the scope and structure of its program, including the extent of state jurisdiction, the scope of regulated activities, anticipated coordination (i.e. with biological agencies), and its permit review criteria which must ensure no jeopardy to listed species. 40 C.F.R. §§ 233.11, 233.20(a). EPA then has the daunting task to determine the adequacy of Florida's authority to administer the CWA § 404 program. 40 C.F.R. § 233.1(a). This also includes reviewing Florida's funding and manpower available for program administration and estimated workload to determine its ability to administer the program. 40 C.F.R. § 233.11.

EPA then must determine whether Florida can fulfill the requirements of the CWA and its implementing regulations, including section 404(b)(1) guidelines and the guidelines' no jeopardy mandate. 40 C.F.R. §§ 233.1(a), 233.15(g). Indeed, section 404(b)(1)'s no jeopardy requirement reiterates the requirements and considerations in ESA § 7(a)(2) consultation. Accordingly, under a programmatic consultation, EPA must review Florida's proposed criteria and process for ensuring state issued permits will not cause jeopardy to listed species. More importantly, EPA may only approve Florida's program if it determines the program fulfills this requirement while taking into account comments from the Services and the Corps. 40 C.F.R. § 233.15(g).

Indeed, even under a programmatic consultation, if assumption is approved, the jeopardy analysis cannot end. States like Florida must <u>still</u> ensure there will be no jeopardy to listed species prior to the issuance of permits for the discharge of dredged or fill material pursuant to the CWA's 404(b)(1) guidelines. A state's program must be at least as stringent as

the federal program, which expressly requires that both individual and general permits comply with the ESA.

The requirements regarding the robustness of a state program can be found in both the text of the CWA and EPA's implementing regulations. CWA § 404(g), which provides for state assumption of the § 404 permitting program, requires that a state certify in its application that state law provides adequate authority to carry out the federal program. EPA's implementing regulations prohibit states from "impos[ing] any less stringent requirements for any purpose." 40 CFR § 233.1 (emphasis added).

The heart of the federal 404 permitting program can be found in the CWA § 404(b)(1) guidelines. The purpose of the guidelines "is to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material." 40 C.F.R. § 230.1(a). The guidelines achieve this purpose in part by prohibiting permits that will "[j]eopardize[] the continued existence of species listed as endangered or threatened under the [ESA], or result[] in likelihood of the destruction or adverse modification ... [of] critical habitat" unless an exemption is granted by the Endangered Species Committee. 40 CFR § 230.10(b)(3). In order to restore and maintain biological diversity, the Guidelines require ESA compliance for each and every permit.

Given this framework, to assume the federal § 404 program, states must have a mechanism to ensure that all permits comply with the ESA because a state program must be at least as stringent as the federal requirements. To further cement the importance of the guidelines, not only do EPA's assumption regulations require that state programs be as stringent as the federal program, they expressly require that states comply with the guidelines in at least two sections. 40 CFR § 233.23 requires that "[f]or each permit the [state] Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines . . . ." (emphasis added). In addition, 40 CFR § 233.34 states that the state Director "will review all applications for compliance with the 404(b)(1) Guidelines . . . ."

Furthermore, EPA's implementing regulations provide a process for the Services to inform both EPA and states that have assumed the program when consultation is required. All public notices for complete permit applications must be provided to EPA for review, which must transmit them to the Services. 40 C.F.R. § 233.50(a)-(b). EPA cannot waive review of permit applications for proposed discharges with "reasonable potential for affecting endangered or threatened species" or discharges within "critical areas established under State or Federal law." 40 C.F.R. § 233.51(b).

While EPA must consult on its discretionary decision to allow a state to take over a § 404 program, states cannot evade later, specific ESA consultation requirements through an up-front abridged consultation. CWA § 404(b)(1) guidelines require compliance with the ESA on a

permit-by-permit basis, reinforcing the importance Congress gave to protection of threatened and endangered species and habitat in the CWA § 404 permitting process.

IV. CONCLUSION

EPA's current position on the interplay between CWA § 404 state assumption and ESA § 7 consultation is incorrect. In reviewing the CWA's plain language, implementing regulations, and legislative history, it is clear that CWA § 404(h) provides EPA discretion in deciding whether to grant a state permitting power, unlike the checklist requirements of CWA § 402(b). Because EPA's action under CWA § 404 is discretionary, EPA must initiate and complete formal consultation under ESA § 7(a)(2) prior to granting any state § 404 permitting power.

Additionally, programmatic consultation over state delegation of a CWA § 404 program alone is not enough. EPA must first consult with the Services and to determine whether a state can fulfill the requirements of the CWA and its implementing regulations, including § 404(b)(1) guidelines and their no jeopardy mandate. 40 C.F.R. §§ 233.1(a), 233.15(g). Overarching programmatic consultation does not relieve the state of its responsibility to determine at the site-specific permit level whether there will be no jeopardy to listed species prior to the issuance of permits for the discharge of dredged or fill material pursuant to the CWA's 404(b)(1) guidelines.

Sincerely,

Kristen L. Boyles
Staff Attorney

Bonnie A. Malloy
Staff Attorney

ORGANIZATIONAL INTERESTS

The Florida Wildlife Federation (FWF) has worked to ensure that Florida's wildlife and fragile environment have a voice since 1936. Among other things, FWF is dedicated to protecting Florida's waterways, as wildlife cannot thrive where wetlands are drained, waters polluted and habitats degraded or destroyed.

The Conservancy of Southwest Florida is dedicated to the protection of Southwest Florida's land, water, wildlife and future through advocacy, science, education, and wildlife rehabilitation. The Conservancy was founded in 1964 in response to plans to build a road through Rookery Bay and carries on its mission to preserve wetlands and downstream areas important to the health of the ecosystem, economy, and quality of life.

Miami Waterkeeper's (MWK) mission is to defend, protect, and preserve South Florida's watershed through citizen engagement and community action rooted in sound science and research. MWK works to ensure swimmable, drinkable, fishable water for all.

The St. Johns Riverkeeper mission is to be an independent voice that defends, advocates, and activates others to protect and restore the St. Johns River, Florida's longest and most significant river for commercial and recreational use.

Columbia Riverkeeper is a non-profit whose mission is to protect and restore the water quality of the Columbia River and all life connected to it, from the headwaters to the Pacific Ocean. All along the Columbia, Columbia Riverkeeper works with people in dozens of communities—rural and urban—with the same goals: protecting the health of their families and the places they love.

Waterkeeper Alliance is an international environmental advocacy organization whose mission is to strengthen and grow a global network of grassroots leaders that will protect everyone's right to clean water that is drinkable, fishable, and swimmable. Waterkeeper Alliance preserves and protects water by connecting and mobilizing more than 350 local Waterkeeper groups worldwide, including 175 in the United States.

The Center for Biological Diversity (Center) believes that the welfare of human beings is deeply linked to nature — to the existence in our world of a vast diversity of wild animals and plants. Because diversity has intrinsic value, and because its loss impoverishes society, the Center works to secure a future for all species, great and small, hovering on the brink of extinction. It does so through science, law, and creative media, with a focus on protecting the lands, waters, and climate that species need to survive.

Natural Resources Defense Council (NRDC) is a non-profit membership corporation founded in 1970. NRDC uses law, science, and the support of members throughout the United States,

including members who reside in Florida, to protect waters and wildlife and to ensure a safe and healthy environment for all living things. For fifty years, NRDC has engaged in scientific analysis, public education, advocacy, and litigation on a wide range of environmental and health issues. NRDC has had a longstanding and active interest in the protection of the nation's waters and wildlife and has worked with federal agencies to enhance public participation in government decision making.